

1 Nicole M. Norris (SBN 222785)
 2 WINSTON & STRAWN LLP
 3 101 California Street, Suite 3900
 San Francisco, CA 94111-5894
 Telephone: 415-591-1000
 Facsimile: 415-591-1400
 Email: nnorris@winston.com

5 James F. Hurst (*Admitted Pro Hac Vice*)
 David J. Doyle (*Admitted Pro Hac Vice*)
 Samuel S. Park (*Admitted Pro Hac Vice*)
 WINSTON & STRAWN LLP
 7 35 W. Wacker Drive
 Chicago, IL 60601-9703
 8 Telephone: 312-558-5600
 Facsimile: 312-558-5700
 9 Email: jhurst@winston.com; ddoyle@winston.com;
 spark@winston.com

10 Charles B. Klein (*Admitted Pro Hac Vice*)
 11 WINSTON & STRAWN LLP
 12 1700 K Street, N.W.
 Washington, D.C. 20007
 Telephone: 202-282-5000
 Facsimile: 202-282-5100
 Email: cklein@winston.com

14 Attorneys for Defendant
 15 ABBOTT LABORATORIES

16 **UNITED STATES DISTRICT COURT**
 17 **NORTHERN DISTRICT OF CALIFORNIA**
 18 **OAKLAND DIVISION**

20 MEIJER, INC. & MEIJER DISTRIBUTION,	)	Case No. CV 07-5985 CW
21 INC., on behalf of themselves and all others	)	<i>Related Per October 31, 2007 Order to</i>
22 similarly situated,	)	<i>Case No. CV 04-1511 CW</i>
23 Plaintiffs,	)	ABBOTT LABORATORIES' MOTION
24 vs.	)	FOR ENLARGEMENT OF TIME TO
25 ABBOTT LABORATORIES,	)	OPPOSE MOTION FOR CLASS
26 Defendant.	)	CERTIFICATION
27 [caption continues next page]	)	Date: August 7, 2008
	)	Time: 2:00 p.m.
	)	Courtroom: 2 (4th Floor)
	)	Judge: Hon. Claudia Wilken

1	ROCHESTER DRUG CO-OPERATIVE, INC.,)	Case No. CV 07-6010 CW
2	on behalf of itself and all others similarly)	<i>Related Per October 31, 2007 Order to</i>
3	situated,)	<i>Case No. CV 04-1511 CW</i>
4	Plaintiffs,)	ABBOTT LABORATORIES' MOTION
5	vs.)	FOR ENLARGEMENT OF TIME TO
6	ABBOTT LABORATORIES,)	OPPOSE MOTION FOR CLASS
7	Defendant.)	CERTIFICATION
8	)	Date: August 7, 2008
9	)	Time: 2:00 p.m.
10	)	Courtroom: 2 (4th Floor)
11	LOUISIANA WHOLESALE DRUG)	Judge: Hon. Claudia Wilken
12	COMPANY, INC., on behalf of itself and all))
13	others similarly situated,))
14	Plaintiffs,)	Case No. CV 07-6118 CW
15	vs.)	<i>Related Per October 31, 2007 Order to</i>
16	ABBOTT LABORATORIES,)	<i>Case No. CV 04-1511 CW</i>
17	Defendant.)	ABBOTT LABORATORIES' MOTION
18	)	FOR ENLARGEMENT OF TIME TO
19	)	OPPOSE MOTION FOR CLASS
20	)	CERTIFICATION
21	)	Date: August 7, 2008
22	)	Time: 2:00 p.m.
23	)	Courtroom: 2 (4th Floor)
24	)	Judge: Hon. Claudia Wilken
25))
26))
27))
28))

Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601-9703

NOTICE

Pursuant to Local Rule 6-3 defendant Abbott Laboratories hereby moves this Court for an order enlarging the deadline by which Abbott must oppose the Motion for Class Certification filed by the direct purchasers in the above captioned cases on May 5, 2008.

INTRODUCTION

Abbott seeks a modest enlargement of the opposition and reply deadlines to account for an anticipated ruling by the Court on Abbott’s pending Motion to Compel Production of Documents and Interrogatory Responses from Plaintiffs. That motion seeks “downstream discovery” from Plaintiffs relevant to whether there is a fundamental conflict between the proposed class members and other members of the putative direct purchaser class – a conflict that precludes certification of the class under Rule 23 of the Federal Rules of Civil Procedure. The Court’s ruling on that motion could materially affect Abbott’s opposition to the class certification motion, which currently is due in less than a week, on June 16.

In March 2008, shortly before their class certification motion was due, Plaintiffs sought and obtained more than a one-month extension of the Court's December 12, 2007 Case Management Order setting forth the class certification briefing schedule. Abbott consented to this request for an enlargement of time by Plaintiffs. On order from the Court, the current class certification briefing schedule is as follows:

June 16, 2008	Defendant's Opposition to Class Certification due
July 14, 2008	Plaintiffs' Reply due
August 7, 2008	Oral Argument

Abbott seeks an order granting Abbott at least one week (longer if the Motion to Compel is granted) from the date of the Court's order on the pending Motion to Compel to oppose Plaintiffs' class certification motion. Abbott also seeks a corresponding extension of the reply deadline. If practicable and acceptable to the Court, Abbott consents to retaining the August 7 hearing date.

Although Abbott consented to Plaintiffs' request for more than a *one month* extension of class certification deadlines, Plaintiffs have indicated that they intend to oppose this modest

1 motion for enlargement. To date, however, Plaintiffs have failed to state how, if at all, they would
2 be prejudiced by the requested extension.

3 ARGUMENT

4 The requested enlargement is warranted under Local Rule 6-3 to account for the fact
5 that Abbott needs sufficient time to address the Court's anticipated ruling on Abbott's Motion to
6 Compel, and the June 16 deadline for Abbott's opposition to Plaintiff's class certification briefing is
7 less than a week away.

8 Abbott's Motion to Compel seeks "downstream discovery" that is directly relevant to
9 this Court's determination of whether class certification is appropriate. *See e.g., Valley Drug Co. v.*
10 *Geneva Pharmaceuticals, Inc.*, 350 F.3d 1181 (11th Cir. 2003); *Allied Orthopedic Appliances, Inc.*
11 *v. Tyco Healthcare Group L.P.*, 247 F.R.D. 156 (C.D. Cal. 2007); *In re Urethane Antitrust*
12 *Litigation*, 237 F.R.D. 454 (D. Kan. 2006). As a result, the Court's disposition of Abbott's Motion
13 to Compel could significantly affect the nature of Abbott's upcoming opposition brief.

14 Abbott could be substantially harmed absent the requested enlargement of time.
15 Without that extension, Abbott could have to oppose the Motion for Class Certification without the
16 materials requested in the Motion to Compel, and without guidance from the Court as to the
17 potential relevance of those materials. If the Court's ruling were to come after June 16, Abbott
18 would likely move to supplement its opposition to address that ruling, thus causing haphazard
19 briefing and inefficient consideration of the relevant class certification issues.

20 Abbott thus proposes an enlargement of time that turns on the nature of the Court's
21 ruling on the Motion to Compel. If the Court grants Abbott's Motion to Compel and requires
22 Plaintiffs to produce the requested "downstream discovery," Abbott suggests that the parties meet-
23 and-confer in an attempt to determine a new deadline for Abbott's response after a reasonable time
24 to produce and review responsive documents and corresponding interrogatory responses. As
25 discussed in the supporting declaration of Charles B. Klein, the parties already have stipulated that
26 some enlargement of time would be necessary under these circumstances to take into account the
27 fact that Abbott agreed to stay enforcement of Rule 45 subpoenas pending resolution of the Motion
28 to Compel.

1 Alternatively, if the Court denies the Motion to Compel, Abbott requests a mere one-
 2 week enlargement of time from the date of the Court's order to file its opposition to Plaintiffs'
 3 Motion for Class Certification. This modest extension would be necessary to allow Abbott and its
 4 expert time to evaluate and address the Court's ruling.

5 In either event, the requested enlargement would postpone the deadline for Plaintiffs'
 6 reply by a commensurate amount of time. If practical and acceptable to the Court, Abbott would not
 7 oppose retaining the current August 7 hearing date.

8 On June 9, 2008, counsel for Abbott contacted counsel for the Meijer plaintiffs in an
 9 effort to reach an agreement as to this requested enlargement of time. Counsel for Plaintiffs
 10 indicated that they would not agree to any extension of time for Abbott to respond to Plaintiffs'
 11 opening class certification brief other than the stipulation discussed above. To date, however,
 12 Plaintiffs have failed to explain how they would be prejudiced by the requested enlargement
 13 designed to allow Abbott to address a ruling on a pending discovery motion. In fact, courts
 14 generally defer consideration of a motion for class certification until after discovery so that they
 15 have enough information to decide the relevant issues. *See, e.g., Miami Univ. Wrestling Club v.*
 16 *Miami Univ.*, 302 F.3d 608, 616 (6th Cir. Ohio 2002) (upholding "the district court's decision to
 17 hold their motion for class certification in abeyance until the parties had concluded discovery);
 18 *Livesay v. Punta Gorda Isles, Inc.*, 550 F.2d 1106, 1111 (8th Cir. 1977), rev'd on other grounds sub
 19 nom *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) (holding that no prejudice occurred during
 20 a 14-month lapse between filing of class certification motion and a decision on the motion, during
 21 which the parties conducted discovery); *Philipp v. Carey*, 517 F. Supp. 513, 521 (N.D.N.Y 1981)
 22 (deferring a decision on class certification "until such time, following further discovery, that all
 23 parties to this action, as well as the Court, can better ascertain class membership"); *Greene v.*
 24 *Southland Corp.*, 83 F.R.D. 117, 122 (N.D. Tex. 1979) (deferring decision on class certification until
 25 after discovery).

26 Consistent with this authority, Abbott acted promptly in attempting to resolve the
 27 parties' discovery dispute in a timely manner. Plaintiffs filed their Consolidated Amended
 28 Complaint on January 1, 2008. Abbott served the discovery requests at issue only two months later,

1 on March 7, 2008. This discovery was served immediately after the completion of briefing on
2 Abbott's Motion to Dismiss the Consolidated Amended Complaint, and more than three months
3 before Abbott's opposition to class certification currently is due. On April 7, 2008, Plaintiffs filed
4 their response to Abbott's discovery requests, objecting to the production of "downstream
5 discovery." In an attempt to resolve the dispute, the parties engaged in a series of meet-and-confers
6 through late April. Failing to reach an agreement, Abbott filed its Motion to Compel on May 12,
7 2008, pursuant to an expedited briefing schedule agreed to by the parties.

8 Plaintiffs' rejection of Abbott's reasonable enlargement request is surprising – and,
9 we submit, inappropriate – given that Abbott previously consented to Plaintiffs' earlier request to
10 extend all class certification deadlines *by more than one month*.

11 CONCLUSION

12 For the foregoing reasons, Abbott respectfully requests that the Court grant its Motion
13 for Enlargement of Time to Oppose Motion for Class Certification.

14
15 Dated: June 10, 2008

WINSTON & STRAWN LLP

16
17 By: /s/ Charles B. Klein

18 Charles B. Klein
19 Attorneys for Defendant
ABBOTT LABORATORIES

20
21
22
23
24
25
26
27
28